Office Supreme Court, U.S.
FILED
OCT 5 1964
JOHN F. DAVIS, CLERK

No. 558

IN THE

Supreme Court Of The United States

October Term, 1964

AAXICO AIRLINES, INC., *Petitioner*

vs.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, ET AL,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN D. WHEELER
A. W. WORTHY
2100 National Bank of Commerce Building
San Antonio, Texas 78205

Of Counsel:

BOYLE, WHEELER, GRESHAM, DAVIS & GREGORY

CLEMENS PRINTING CO. SAN ANTONIO, TEXAS

INDEX

	Page No.
Index	i
Table of Authorities	i
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statute	3
Statement:	
The Pleading	3
The Facts	4
Action of the Courts Below	10
Reasons for Granting Writ:	
The Representation Issue	10
Whether Failure of ALPA and C-46 Pilots to Request Conferences on Disputes as to Termination is a Bar to this Action	21
Conclusion	26
Appendix A	1a
Appendix B	14a

TABLE OF AUTHORITIES

	Pages
Brotherhood of Railway and Steamship Clerks, etc. v. United Air Lines, Inc., Case No. 801, Supreme Court Docket	10, 11
General Committee v. Missouri, Kansas, Texas Railroad Company, 320 U.S. 323, 88 L.Ed 76 (1943)	18, 19, 20, 21

John Wiley & Sons v. Livingston, U.S. , 11 L.Ed.2d 899 ..... 13, 15

Slocum v. Delaware L. & W. R. Company, 339 U.S. 239, 94 L.Ed. 795 (1950) 21

Switchmen's Union v. National Mediation Board, 320 U.S. 297, 88 L.Ed. 61 (1943) 20

Virginia Railway Company v. System Federation No. 40, 300 U.S. 515, 81 L.Ed. 789 (1937) 17, 18

Atlantic Coast Line R. Co. v. Pope, 119 F.2d 39 (4th Cir., 1941) 25

Breeland v. Southern Pacific Co. 231 F.2d 576 (9th Cir., 1955) 25

Butte, Anaconda & P. Ry. Co. v. Brotherhood of L. F. & E., 268 F.2d 54 (9th Cir., 1959, cert. den. 6 L.Ed.2d 388) 21

Division 14 v. Leighty, 298 F.2d 17 (4th Cir., 1962 cert. den. 369 U.S. 885, 8 L.Ed.2d 287) 19, 21

International Ass'n of Machinists v. Northwest Airlines, 304 F.2d 206, 212 (8th Cir., 1962) 25

N.L.R.B. v. Armato, 199 F.2d 800 (7th Cir., 1952) 14

N.L.R.B. v. Auto Ventshade, Inc., 276 F.2d 303 (5th Cir., 1960) 14

N.L.R.B. v. Grace Co., 184 F.2d 126 (8th Cir., 1950) 14

N.L.R.B. v. Lunder Shoe Corp., 211 F.2d 284 (1st Cir., 1954) 14

N.L.R.B. v. McFarland, 306 F.2d 219 (10th Cir., 1962) 14

Order of Ry. Conductors & Brakemen v. Switchmen's Union 269 F.2d 726 (5th Cir., 1959, cert. den. 361 U.S. 899, 4 L.Ed.2d 155) 21

Peoples v. Southern Pacific Co., 232 F.2d 707 (9th Cir., 1956) 25

Ruby v. American Airlines, 323 F.2d 248 (2nd Cir., 1963, cert. den. U.S. , 11 L.Ed.2d 611) 19

Rutland Ry. Corp. v. Brotherhood, 307 F.2d 21 (2nd Cir., 1962, cert. den. 9 L.Ed.2d 978) 25

Sigfried v. Pan American World Airways, 230 F.2d 13 (5th Cir., 1956, cert. den. 351 U. S. 925, 100 L.Ed. 1455) 21

STATUTES

Page No.

Railway Labor Act:
44 Stat. L. 577, 48 Stat. 1185, 49 Stat. 1189, 28 USC 1254 (1), 45 USC, Sec. 151, et seq. 3
28 USC, Sec. 1331, 1332 and 1337 3
28 USC, Sec. 2201, et seq. 3
29 USC, Sec. 185 3
45 USC, Sec. 2 Ninth 16, 20, 21, 23
45 USC, Sec. 5 First 20
45 USC, Sec. 6 3, 23, 24, 25
45 USC, Sec. 152 Sixth 7
45 USC, Sec. 183 7
45 USC, Sec. 201 20
45 USC, Sec. 203 20, 21, 23, 24
45 USC, Sec. 204 21
45 USC, Sec. 301 (a) 15

IN THE

Supreme Court Of The United States

October Term, 1964

No. . . . . .

AAXICO AIRLINES, INC., *Petitioner*

vs.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, ET AL,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AAXICO AIRLINES, INC., prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above cause on April 15, 1964.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, infra) is reported at 331 F.2d 433. The trial court rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered April 15, 1964, (R p. 829). Motions for rehearing were overruled July 10, 1964. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Does the United States District Court have jurisdiction of an action by pilot employees and their labor representatives, under the air carrier provision of the Railway Labor Act, to require the employer to submit questions of application and construction of a collective bargaining agreement to a system board of adjustment under circumstances which raise substantial questions as to the continued representative status of the union and as to the continuing obligation of the employer under the collective agreement? The circumstances raising these questions are: the employer, which had as its sole business the performance of scheduled flights of twin engine C-46 aircraft under contract with the United States Air Force, lost its Air Force contract, furloughed its pilots and leased its aircraft to the successful bidder; the C-46 pilots, with consent of the union, contracted with the successful bidder for assumption of the collective agreement and were employed by the successful bidder under that agreement in performance of the Air Force contract.

2. Do the facts that the employer gave formal notice of termination of the agreement, that the union failed to request conferences as is required by the Section 6 of the Railway Labor Act, and that time for intervention of the National Meditation Board has expired bar complainants from equitable relief requiring the employer to submit questions of contract construction to a system board of adjustment?

STATUTE

The statute involved and referred to herein is the Railway Labor Act (44 Stat. L. 577, 48 Stat, 1185, 49 Stat. 1189, 45 U.S.C. Sec. 151, et seq.) the pertinent portions of which are set out herein as Appendix B.

STATEMENT

The Pleadings AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, a labor union, and certain of its pilot members brought this suit against AAXICO AIRLINES, INC., seeking judicial enforcement of a collective bargaining agreement entered into pursuant to the Railway Labor Act so as to require AAXICO to recall the pilots, train them to fly large four engine aircraft and to pay them wages claimed lost. The complaint also sought a declaration of the rights of the parties under the contract and the Railway Labor Act. (R. 6-35) Jurisdiction was claimed in the trial court under 28 U.S.C., Sec. 1331, 1332 and 1337; 28 U.S.C., Sec. 2201 et seq; and 29 U.S.C., Sec. 185. (References are to the printed record)

AAXICO moved for dismissal of the action on the ground that the Railway Labor Act vests jurisdiction of the dispute exclusively in administrative bodies created pursuant to the Act. (R. 41-2, 56-7, 116-18). In addition, AAXICO asserted defenses to the suit on the merits. (R. 850-879, 579-586).

The Facts: Prior to June 30, 1960, and for approximately eight (8) years, AAXICO was continuously engaged in the performance of contracts with the United States for air transportation on regular scheduled flights in direct support of the defense establishment in a program referred to as the LOGAIR Program. Flights operated in LOGAIR were of a short haul nature, and C-46 twin engine aircraft were used. (R. 589) (R. 601-2) Although it had submitted a bid, AAXICO did not secure the contract with the United States in the LOGAIR Program for the period beginning July 1, 1960. (R. 589-90) On June 17, 1960, AAXICO by letter advised its employees as follows:

> "I sincerely regret to advise you that the Company has been unsuccessful in securing the award of Logair routes to be flown during fiscal year 1961, beginning July 1, 1960.
>
> "This letter, therefore is official notification to you that, effective midnight, June 30, 1960, you will be furloughed. The furloughs of those pilots who may be required to complete a flight after midnight June 30 will take effect as of the com-

pletion of such flight. You are required to file your address with us and to notify us promptly of any change of address." (R. 28)

AAXICO ceased all operations, sold portions of its property necessary for flying operations, and furloughed or discharged all personnel having flight operations duties. Only the corporation's president, general manager and treasurer remained to manage the assets of the corporation. (R. 590)

Capitol Airways, Inc., was the successful bidder on those portions of the LOGAIR Program theretofore operated by AAXICO. (R. 590) Capitol Airways, Inc., leased approximately twenty-four (24) C-46 aircraft from AAXICO for the purpose of continuing these aircraft in the LOGAIR operation. (R. 590-1)

On June 30, 1960, Capitol Airways, Inc., agreed to assume the AAXICO collective bargaining agreement and employ the AAXICO pilots under its terms. (R. 637) This agreement was negotiated by Lucien McLeod, then chairman of the Master Executive Committee for the AAXICO pilots and the highest union official in the AAXICO local. (R. 618-9) The agreement was expressly joined by individual pilots who are parties to the suit. (R. 658) The agreement was participated in by high officers of the union to such an extent that United States District Court, Middle District of Tennessee, Nashville Division, held the union estopped to assert provisions of its bylaws re-

fusing authority to McLeod to contract for the union. (R. 655 et seq.) Capitol did employ as many of the pilots as desired this employment. (R. 597, 690-704)

On October 17, 1960, AAXICO wrote to the union as follows:

> "Aaxico Airlines has suspended service in all forms of air transportation. We operated our last flights in early July of 1960 and have not had any pilots in our employ since that date.
>
> "On December 7, 1959, an Agreement and various Letters of Agreement and a Supplemental Agreement were signed between Aaxico Airlines, Inc. and The Air Line Pilots in the service of Aaxico Airlines, Inc. as represented by The Air Line Pilots Association International.
>
> "This letter is to advise that the subject matter of the agreements listed in the Paragraph above no longer exists and therefore Aaxico Airlines considers these agreements terminated and of no further legal force and effect." (R. 31)

The union replied on November 8, 1960, in part as follows:

> "We are not in a position to agree entirely with your statement. So long as AAXICO remains inoperative, this document lies dormant. In the event that operations of the Company are resumed, however, within the period in which AAXICO pilot employees have job tenure under this Agreement, this Association would require their reemployment by the Company." (R. 32)

The union took no other action with respect to this notice of termination. Neither the union nor the pilots made any effort to negotiate further with AAXICO concerning any matter. The union gave no notice of a desire for a meeting under the provisions of 45 U.S.C., Sec. 152 Sixth. No attempt was made to invoke the services of the National Mediation Board under 45 U.S.C., Sec. 183. No grievance was filed with the employer under the grievance procedure provided in the contract. No appeal was taken to the System Board of Adjustment. (R. 14, Complaint par. 19, 20, 21).

In May, 1961, the Air Force revised the LOGAIR Program to provide long distance trunk line flights across the United States using large four engine DC-6A aircraft. (R. 595) AAXICO bid on contracts under the LOGAIR Program and on June 2, 1961, was conditionally awarded the DC-6A contract. (R. 598). AAXICO was also successful bidder on the "Missile" contract, requiring the operation of one DC-6A and one four engine DC-4. (R. 258)

These contracts did not require revival of the old C-46 operation. They put AAXICO in a new business. (R. 602)

The qualifications of the personnel required for this new operation were substantially different from those of the personnel who performed the C-46 opera-

tions. None of the pilots previously employed to operate C-46 aircraft, assuming they were contractually free to do so, were qualified for four engine aircraft. (R. 599-60)

AAXICO undertook the operation of the missile and DC-6A contracts more than eight (8) months after the exchange of letters of October and November. During that period, until the filing of suit in Florida on June 28, 1961, there was no communication of any kind between the parties. AAXICO expended substantial sums and committed itself contractually to pilot supply companies, referred to in the record as IASCO and ASCO, for the supplying of qualified four engine aircraft, and also committed itself to the Air Force for an expensive air transportation effort in a new field. (R. 604)

On June 28, 1961, the union brought suit in the Florida State courts against AAXICO. (R. 44-46) In that action, as in this one, the union sought construction of the contract, declaration of rights and enforcement of the contract. (R. 46) This suit was subsequently dismissed, but not until this action was brought and AAXICO moved to stay this action pending a decision of the Florida State court. (R. 41-2, 52)

On July 20, 1961, twenty (20) days after AAXICO began DC-6A operations, S. E. Terry, by letter addressed to Howard J. Korth, for the first time asserted

what purported to be a grievance under the terms of the collective bargaining agreement. The letter states:

> "Pursuant to the Agreement between Aaxico Airlines, Incorporated and the air line pilots in its service, as represented by the Air Line Pilots Association, International, the pilots of Aaxico Airlines, Inc., hereby file this as a Group Grievance and request an investigation and hearing thereon. The grievance is based upon the Company's violation of the Agreement specifically including Sections 13 and 24 thereof, by refusing to recall furloughed pilots." (R. 33)

Section 13 of the contract provides for seniority. Section 24 provides for the demotions and reductions of personnel. (R. 27)

Howard J. Korth replied to the July 20th letter on July 27, 1961, as follows:

> "As Airline Pilots Association International was advised on October 17, 1960, Aaxico Airlines considers that the agreement previously existing between Aaxico Airlines and the airline pilots in the service of Aaxico has been terminated. This company, therefore, could not possibly be in violation of such terminated agreement and your request for a hearing based upon an alleged group grievance is entirely out of line, and of course, cannot be considered by this company." (R. 34)

On August 4, 1961, S. E. Terry replied as follows:

> "I am in receipt of your letter of July 27, 1961, denying my request for a hearing relative to a group grievance dated July 20, 1961. Since this

decision is unsatisfactory to the affected pilots, I hereby request an appeal hearing.

"It is requested that the Company send a copy of all hearing notices and decisions rendered in this case to the undersigned and to the Legal Department, Air Line Pilots Association, International, 55th Street and Cicero Avenue, Chicago 38, Illinois." (R. 35)

AAXICO made no reply to this letter.

Action of the Courts Below: On Motion for Summary Judgment, the trial court found that it had jurisdiction, declared the collective agreement to be in effect, found that AAXICO'S actions in failing to recall and train the C-46 pilots had breahed the agreement, and ordered AAXICO to honor the agreement. (R. 646 et seq., 678 et seq.) The Court of Appeals reversed and remanded with an opinion which permits the trial court to order AAXICO to submit the questions of effectiveness, application and construction of the collective agreement to a system board of adjustment. (Appendix A)

REASONS FOR GRANTING WRIT

I.

The Representation Issue: This case involves questions similar to those presented in Brotherhood of Railway and Steamship Clerks, etc., v. United Air Lines, Inc., which is set down for argument No. 31 for the October Term, 1964. The questions presented are

not identical to those in Case No. 801, but are complementary. For this reason, it is the opinion of Petitioner that consideration of the two cases together will assist the Court.

In United Airlines the representation question arises because of a merger which the C.A.B. approved after refusing the request of the union that the merged corporation be required to recognize existing collective bargaining agreements. In the instant case the representation question arises because the bargaining unit went as a whole with the work to another employer who assumed the collective bargaining agreement.

It is evident that in both cases two questions may be found: (1) whether the representative status of the union to the employer continued after the change giving rise to the dispute, and (2) whether the employees' contract rights (or some of them) survived the change. It is useful for purposes of analysis to recognize the differences between United Airlines and the instant case as the differences bear on these questions.

In United Airlines the question raised by the union is whether its representative status survived the merger and attaches to the successor corporation so as to permit the union, on behalf of its members, to assert a pre-merger collective agreement. The union denies any claim to representation of the members in future contract negotiations. It seeks therefore to split "representation" rights along the lines of "major" and

"minor" disputes and to continue the union's representation for purposes of "minor" disputes although its rights for "major" disputes did not survive the merger.

In the instant case the question is whether the union's representative status to the old employer survived the shifting of the bargaining unit to a new employer with whom the union dealt as representative. The union claims the right to enforce the contract against the old employer and also the right to negotiate with the old employer respecting future relationships with old and new employees.

In both cases the initial question is whether the Railway Labor Act places jurisdiction to decide these questions in the Courts.

ALPA and its members seek to simultaneously assert representation and contract rights on behalf of the same group of employees against two employers. It is ALPA's theory that its furloughed pilot members continued to have recall rights against AAXICO despite their assertion of, and exercise of, contract and representation rights against Capitol Airways, AAXICO's successor in operation of C-46 LOGAIR schedules. ALPA was, if this contention be sound, simultaneously the representative of the C-46 pilots to AAXICO and to Capitol. ALPA claims that it is, at all events, still the labor representative of any pilot employees AAXICO may have.

To a limited, but vital, extent the Court of Appeals' decision approves these claims. The Court of Appeals remanded this case with an opinion which will permit the trial court, if it finds that AAXICO frustrated ALPA's efforts to process its claims under the grievance procedure, to require AAXICO to now permit and join in such processing. Thus, the Court of Appeals holds that ALPA and the pilots have representation and contract rights against AAXICO which survived the shift of the entire bargaining unit to a new employer and continuation with the new employer of the same employment under the same collective agreement.

Petitioner believes the decision of the Court of Appeals on this portion of the cause is inconsistent with the developing federal law relating to collective agreements and employer-employee relationships.

It is now evident, based on this Court's holding in John Wiley & Sons v. Livingston, ... U.S. ....., 11 L.Ed. 2d 899, that the national labor policy permits and requires that in some circumstances contract rights survive a change in employers. The several Courts of Appeals have long held that union representation rights survive such a change. It is also evident that the continuance of such rights is not dependent on common law contract concepts but is based instead on the belief that stability of relationship of employees to the work performed will promote industrial peace.

The concept of a "common law of a particular industry or of a particular plant" discussed in John Wiley & Sons obviously depends on the continued existence of the plant or industry. The Court suggests that contract rights would be held not to survive against a successor where there was "lack of any substantial continuity of identity of the business enterprises . . . ." Similarly, the Courts of Appeals have held that representation status under the National Labor Relations Act survives without regard to the form of transfer from old to new employer unless the transfer ". . . has changed the employing industry so as to render the certified bargaining unit inappropriate . . . ." N.L.R.B. v. McFarland, 306 F.2d 219 (10th Cir. 1962), N.L.R.B. v. Armato, 199 F.2d 800 (7th Cir. 1952); N.L.R.B. v. Lunder Shoe Corp., 211 F.2d 284 (1st Cir. 1954); N.L.R.B. v. Auto Ventshade, Inc., 276 F.2d 303 (5th Cir. 1960); N.L.R.B. v. Grace Co., 184 F.2d 126 (8th Cir. 1950).

In the instant case the record establishes the continued existence of the business of performance of the C-46 schedules under the LOGAIR contract. Capitol took over the schedules intact from AAXICO and operated them with former AAXICO pilots and aircraft. The "common law of the plant" as well as the express contract continued with the substitution of a new employer.

On the other hand, the business of AAXICO

changed radically. Although it retained its capital and top management, no other facet of the business remained. All property used in flying operations was either sold, leased or otherwise disposed of. AAXICO's new operations required new facilities and aircraft and also required differently qualified flight personnel.

John Wiley & Sons and the representation cases cited above are concerned only with the obligations of the new employer. They do not deal with the continued obligations of the old employer, if any exist. Nevertheless, reason and logic require that the imposition of duties on the new employer, on the ground that he has inherited the common law of the shop, should require the release from those same obligations of the old employer who no longer has the shop. This corollary should certainly apply in the instant case where the old employer's business lacks substantial continuity of identity with the business in which the employer was formerly engaged.

John Wiley & Sons, supra, arose under Sec. 301 (a) of the National Labor Relations Act expressly vesting in the federal courts jurisdiction of actions to enforce labor contracts. Each of the representation cases cited arose as actions to enforce N.L.R.B. awards and were reviewed under statutory provisions placing jurisdiction in the Courts of Appeals. No comparable provisions occur in the Railway Labor Act, and comp-

arable cases have not reached the federal courts under the Railway Labor Act. Petitioner urges these cases solely in support of its contention that a substantial representation question exists in this cause.

Because the representation question exists we submit that it should be resolved before questions of the construction of the collective agreement are submitted to a system board of adjustment. If, as Petitioner believes is the case, the shift of the AAXICO bargaining unit to Capitol, and Capitol's assumption of the collective agreement, relieved AAXICO of further obligations either to ALPA as representative or to the C-46 pilots under the agreement, then the questions of contract construction are moot. Orderly administration of the Railway Labor Act would, therefore, require that the representation issue be resolved before fruitless litigation is conducted looking toward resolution of disputes as to those matters of contract application and construction which the Court of Appeals correctly held are within the exclusive jurisdiction of the system board of adjustment.

Who shall decide this question, the Board or the Court? The decisions of this Court plainly support Petitioner's contention that the Board and not the Court has jurisdiction.

Section 2 Ninth of the Railway Labor Act provides:

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act."

This Court in Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515, 81 L.Ed. 789 (1937) held that portion of the statute which requires that "the carrier shall treat with the representative so certified" is mandatory and enforceable by injunction by the federal courts. It is on this language of the Act and the holding in Virginia Ry. Co. that ALPA and its members seek to found their case. Respondents claim that because ALPA was certified by the Board as bargaining agent to AAXICO, and because AAXICO has not sought out and bargained with ALPA respecting employment of pilots to operate the DC-6A aircraft, that AAXICO has refused to bargain within the meaning of Virginia Railway Co., and therefore may be and should be enjoined to so bargain.

This door to the courts opened by Virginia Railway Co. was at least partly shut again by General Commfttee B.L.E. v. M.K.T., 320 U.S. 323, 88 L.Ed. 76, in which this Court held that the courts lack jurisdiction to resolve jurisdictional conflicts between two unions, each seeking for their members the right to perform particular services. With respect to Virginia Ry. Co. v. System Federation No. 40, supra, the Court stated at p. 335:

> ". . . In that connection reference is made to the statement of this Court . . . that the Act imposes upon the carrier 'the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other.' That expresses the basic philosophy of Section 2 Ninth. **But the decision does not imply, as is argued here, that every representation problem arising under the Act presents a justiciable controversy.** It does not suggest that the two respective domains for two or more overlapping crafts should be litigated in the federal courts." (emphasis added)

In General Committee, supra, and its companion cases two unions competed for the same work. There was no representation dispute in the sense of their being competing unions seeking to represent the same employees. Rather the question was which group of employees, each having a certified representative, would be entitled to perform disputed work. The case at bar presents similar issues. ALPA and the C-46 pilots seek to displace from employment another

group of pilots in operation of the DC-6A aircraft now operated by AAXICO.

The DC-6A pilots do not have a representative certified by the National Mediation Board. They are not parties to this suit and have not sought certification of any representative. Arguments that such facts make General Committee distinguishable have been rejected in other cases. Division No. 14 v. Leighty, 298 F.2d 17 (4th Cir. 1962, cert. den. 369 U.S. 885); Ruby v. American Airlines, 323 F.2d 248 (2nd Cir. 1963, cert. den. U.S. , 11 L.Ed.2d 611). The existence of two groups of employees, each having a claim to the work, and not their representative status, should be the basis for finding the existence of the dispute.

While there was no dispute between employees as to who was the representative in General Committee, there is such a dispute in the case at bar. To the extent that ALPA claims the right to represent the DC-6A pilots now operating AAXICO's aircraft there is a dispute within the express language of the Section 2 Ninth. The DC-6A pilots were employed by AAXICO under contract with pilot supply companies, and their wages, hours and working conditions are controlled by this contract. The case at bar is similar in some respects to Ruby v. American Airlines, 323 F.2d 248 (2nd Cir. 1963, cert. den., 11 L.Ed.2d 611). Nevertheless, the principal aim of Respondents is not representation of the DC-6A pilots, but their replacement.

In General Committee, the Court was able to conclude that the claim was not justiciable without its having to construe Sec. 2 Ninth and other provisions of the Act to determine whether the National Mediation Board does have jurisdiction of such suits under that provision of the Act. It is apparently the view of the National Mediation Board that Sec. 2 Ninth does not provide for settlement of jurisdictional disputes under the procedures of that Section. General Committee, supra, page 336, note 11. This question is of substantial importance to the administration of the Act, but its answer is not dispositive of this case since it is clear that under other provisions of the Act, the Mediation Board does have jurisdiction of the controversy for some purposes.

Sec. 2 Ninth gives the Board adjudicatory functions in case of representative disputes within its coverage. The Board's decision in these cases is final and not reviewable. Switchmen's Union v. National Mediation Board, 320 U.S. 297, 88 L.Ed. 61 (1943). Any dispute relating to representation not covered by Sec. 2 Ninth and not involving those matters within the jurisdiction of the system board of adjustment is also within the board's jurisdiction, but as a mediator and not a judge. Sections 201, 203; Sec. 5 First. Only those disputes "growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions" are within the jurisdiction

of the system board of adjustment. Sec. 204. It is well settled that the quoted language relates to the enforcement of existing rights growing out of a collective agreement and does not reach representation disputes. Slocum v. Delaware, L. & W. R.R. Co., 339 U.S. 239, 94 L.Ed. 795 (1950); General Committee v. MKT RR Co., 320 U.S. 323, 88 L. Ed. 76 (1943); Division 14 v. Leighty 298 F.2d 17 (4th Cir. 1962, cert. den. 369 U.S. 885, L.Ed.2d 287); compare Order of Railway Conductors and Brakemen v. Switchmen's Union, 269 F.2d 756 (5th Cir. 1959); Butte, Anaconda & P. Ry. Co. v. Brotherhood, 268 F.2d 54 (9th Cir. 1959, cert. den. 6 L.Ed. 2d 388); Sigfried v. Pan American World Airways, 230 F.2d 13 (5th Cir. 1956). The board, therefore, has jurisdiction of this matter either in its adjudicatory capacity under Sec. 2 Ninth or as a mediator under Sec. 203. In either case, the Board and not the courts has jurisdiction and the complaint should be dismissed as non justiciable. General Committee, supra, at p. 332.

II.

Whether Failure of ALPA and C-46 Pilots to Request Conferences on Disputes as to Termination is a Bar to this Action:

When AAXICO gave formal notice to ALPA that the contract was terminated the union replied only that it was "not in a position to agree entirely . . ." and that "[i]n the event that operations of the Com-

pany are resumed . . . within the period in which AAXICO pilot employees have job tenure under this Agreement, this Association would require their re-employment by the Company." No request for conferences or for mediation, or for any other action was made and no such action was taken.

After AAXICO was committed to the new DC-6A program, which could not be flown by the former C-46 pilots, ALPA brought suit for judicial construction and enforcement of the collective agreement.

Petitioner submits that the equitable relief sought by respondents should be held barred because of their failure to seek timely relief under the processes of the Railway Labor Act.

The Court of Appeals discussed the issues involved as follows:

> "This letter from Aaxico and the reply by ALPA had clearly created the first dispute between the parties. If this dispute was referable to a construction of the terms of the then existing contract, the procedure required by the Railway Labor Act was that the aggrieved party should have then filed a grievance and processed it through the System Board of Adjustment. If, on the other hand, this amounted to the thirty days' written notice contemplated by Section 6 of Title 1 of the Railway Labor Act of 'an intended change in agreements affecting rates of pay, rules or working conditions,' the parties were under obligation to

arrange for the conference provided for in Section 6 of Title 1 and proceed through the Mediation Board until the negotiations for the new contract, or the change in the old contract, were exhausted.

"Neither of these procedures was followed . . ."

The Court did not, however, decide whether the notice created a "major" or "minor" dispute. Instead the Court looked to the relief sought by the complaint and, without regard to the representation defense raised by Petitioner, concluded that the relief sought required disposition of matters within the exclusive jurisdiction of the System Board. Petitioner submits that the Court of Appeals is correct in holding that the complaint does raise questions within the exclusive jurisdiction of the system board, but that the issues raised by both the complaint and answer show a representation dispute exclusively within the jurisdiction of the National Mediation Board under either Sec. 2 Ninth or Sec. 203, and that respondents failed to timely invoke the remedies provided for such disputes.

For reasons discussed in connection with I. above, Petitioner believes the representation dispute is not referable to a system board of adjustment. Petitioner did, in fact, give formal notice of termination of the agreement. Such notice would appear clearly to be within the provisions of Section 6 and to portend "an intended change in agreements affecting rates of pay, rules or working conditions . . ."

Section 6 provides:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Quite obviously this Section was intended to require the parties to maintain the status quo pending processing of Section 203 disputes as is required by the Act. The parties must first confer, and strive for agreement. Failing to reach agreement either party may seek the participation of the Mediation Board. If all else fails, a presidential commission may be created and seek to adjust the dispute. Until the course of these events is run the employer is forbidden

to change wages, hours or working conditions, and the union may not strike.

The Act does not, however, forbid changes or a strike after notice unless a dispute is raised and conferences begun. In the absence of some showing of interest by the union, Section 6 permits an employer to give effect to the proposed changes. In this instance the change proposed was the severance of relationship between the contracting parties. Because the undisputed evidence shows that the Respondents did not comply with Section 6 of the Act, they should be denied equitable relief seeking at this late date to raise and adjust their dispute. See Rutland Ry. Corp. v. Brotherhood, 307 F.2d 21 (2nd Cir. 1962, cert. den. 9 L.Ed.2d 978); I.A.M. v. Northwest Airlines, 304 F.2d 206 (8th Cir. 1962); People v. Southern Pac. Co., 232 F.2d 707 (9th Cir. 1956); Atlantic Coast Line R. Co. v Pope, 119 F.2d 39 (4th Cir. 1941; Breeland v. Southern Pac., 231 F.2d 576 (9th Cir. 1955).

CONCLUSION

Petitioner respectfully submits that this application should be granted.

JOHN D. WHEELER

A. W. WORTHY

Attorneys for Petitioner
AAXICO AIRLINES, INC.

Of Counsel:
BOYLE, WHEELER, GRESHAM, DAVIS
& GREGORY
2100 National Bank of Commerce Building
San Antonio, Texas 78205

APPENDICES

APPENDIX A

Opinion

IN THE

United States Court Of Appeals

FOR THE FIFTH CIRCUIT

No. 20931

AAXICO AIRLINES, INC.,

Appellant,

versus

AIR LINES PILOTS ASSOCIATION, INTERNATIONAL, ET AL.,

Appellees.

Appeal from the United States District Court for the Western District of Texas.

(April 15, 1964.)

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

TUTTLE, Chief Judge: This appeal raises the question whether the trial court had jurisdiction to construe what it found to be a subsisting agreement and to grant an injunction requiring the appellant to carry out the terms of such agreement as construed by the trial court.

The contest between the parties arose in the following manner:

Aaxico had for several years conducted an air transportation business with the use of C-46 aircraft on the basis of contracts with the United States Government. Beginning on June 16, 1956, Aaxico and ALPA had been parties to a collective bargaining agreement covering the employees flying its aircraft. The most recent of the collective bargaining agreements between the parties became effective on January 1, 1960. It provided that it was to continue in full force and effect until June 30, 1961, "and thereafter until each succeeding June 30, unless written notice of intended change is served in accordance with Section 6, Title 1 of the Railway Labor Act by either party thereto at least 60 days prior to June 30, 1961, or June 30 of any succeeding year."[1] Prior to the expiration date of this last agreement, and without any specific written notice "of an intended change in agreements affecting rates of pay, rules or working conditions," on the occasion of Aaxico's losing its Logair (Government) contract as of June 30, 1960, and the leasing by it of approximately 25 C-46 aircraft to Capitol Airways, which company acquired the Logair contract from the Government, Aaxico furloughed all of its approximately 221 pilot employees by giving them two weeks' notice as required

---

1 Section 6, Title 1 of the Railway Labor Act is a provision relating to the change "in agreements affecting rates of pay, rules or working conditions," and provides for the processing of bargaining through the Mediation Board before proposed changes in such existing agreements can be put into effect.

under the agreement. The notice contained the statement, "We cannot, at this time, see any possibility of a resumption of our Logair flying but if any change should take place you will be promptly notified."

Thereafter, although Aaxico had no other air transportation business to carry on until it was able to obtain further or new contracts, it did not dissolve but maintained a skeleton organization principally engaged in seeking new contracts including an effort to bid on the following year's Logair contract.

On October 17, 1960, during the stated life of the contract, Aaxico wrote to ALPA as follows:

> "Aaxico Airlines has suspended service in all forms of air transportation. We operated our last flights in early July of 1960 and have not had any pilots in our employ since that date.
>
> "On December 7, 1959 an Agreement and various Letters of Agreement and a Supplemental Agreement were signed between Aaxico Airlines, Inc. and The Air Line Pilots in the service of Aaxico Airlines, Inc. as represented by The Air Line Pilots Association International.
>
> "This letter is to advise that the subject matter of the agreements listed in the Paragraph above no longer exists and therefore Aaxico Airlines considers these agreements terrminated and of no further legal force and effect."

Appellee replied on November 8, in part, as follows:

"We are not in a position to agree entirely with your statement. So long as AAXICO remains inoperative, this document lies dormant. In the event that operations of the Company are resumed, however, within the period in which AAXICO pilot employees have job tenure under this Agreement, this Association would require their re-employment by the Company."

This letter from Aaxico and the reply by ALPA had clearly created the first dispute between the parties. If this dispute was referable to a construction of the terms of the then existing contract, the procedure required by the Railway Labor Act was that the aggrieved party should have then filed a grievance and processed it through the System Board of Adjustment. If, on the other hand, this amounted to the thirty days' written notice contemplated by Section 6 of Title 1 of the Railway Labor Act of "an intended change in agreements affecting rates of pay, rules or working conditions," the parties were under obligation to arrange for the conference provided for in Section 6 of Title 1 and proceed through the Mediation Board until the negotiations for the new contract, or the change in the old contract, were exhausted.

Neither of the procedures was followed. Instead, after Aaxico obtained new Government contracts, effective July 1, 1961, in the performance of which it used DC-6A aircraft, a type of aircraft different from that which had theretofore been used in the prior

operation and as to which pilot qualifications are different and more stringent, the Airline proceeded to obtain pilots through two pilots supply companies which, for the purpose of this appeal, we can assume amounted to nothing more or less than a service agent for the employment of pilots by the Airline itself. However, prior to the actual commencement of operation, on June 28, 1961, appellee, without having made any further demand or request for arbitration or mediation under either provision of the Railway Labor Act, brought suit in the Florida State Courts against the appellant seeking a construction of the contract, a declaration of the rights, and enforcement of the contract.[2]

The next step chronologically was that on July 20, 1961, after appellant had begun DC-6A operations, appellee addressed a letter containing the following to the President of Aaxico:

> "Pursuant to the Agreement between Aaxico Airlines, Incorporated and the air line pilots in its service, as represented by the Air Line Pilots Association, International, the pilots of Aaxico Airlines, Inc., hereby file this as a Group Grievance and request an investigation and hearing thereon. The grievance is based upon the Company's violation of the Agreement, specifically including Sec-

---

2 This suit was subsequently dismissed, but not until after this present action was brought in the federal court and appellant moved to stay this action pending a decision of the Florida State Court

tions 13 and 24 thereof, by refusing to recall furloughed pilots."

Section 13 of the contract provides for seniority. Section 24 provides for the demotions and reduction of personnel.

The President of the appellant replied on July 27th as follows:

> "As Airline Pilots Association International was advised on October 17, 1960, Aaxico Airlines considers that the agreement previously existing between Aaxico Airlines and the airline pilots in the service of Aaxico has been terminated. This company, therefore, could not possibly be in violation of such terminated agreement and your request for a hearing based upon an alleged group grievance is entirely out of line and, of course, cannot be considered by this company."

To this letter appellee replied on August 4th:

> "I am in receipt of your letter of July 27, 1961 denying my request for a hearing relative to a group grievance dated July 20, 1961. Since this decision is unsatisfactory to the affected pilots, I hereby request an appeal hearing.
>
> "It is requested that the Company send a copy of all hearing notices and decisions rendered in this case to the undersigned and to the Legal Department, Air Line Pilots Association, International, 55th Street and Cicero Avenue, Chicago 38, Illinois."

No action thereafter having been taken by either

party relating to the matter of grievance, ALPA filed this suit on August 24, 1961.

The pleadings and proof adduced before the trial court presented the following issues:

> (1) Did the loss by Aaxico of its sole air carriage contract, followed by the leasing of its planes to another airline and the furloughing of all of its pilots, and the complete suspension of its operations pending the obtaining of a new contract, either constitute a termination of the collective bargaining agreement then in effect or did it warrant Aaxico in treating it as terminated by its unilateral action?
>
> (2) What tribunal is appropriate under the National Railway Labor Act to decide issue No. 1?
>
> (3) If the agreement between Aaxico and ALPA remained in effect through the date of expiration, June 30, 1961, notwithstanding the circumstances mentioned in issue No. 1, were any of the rights of ALPA and its members under such agreement violated upon the occasion of Aaxico's reengaging in air carriage under the contracts it obtained to be effective July 1, 1961?
>
> (4) If such rights were violated, what tribunal should make these determinations?
>
> (5) Did the district court have jurisdiction over this controversy and, if so, to what extent?

The trial court held that the first issue was to be answered in the negative. It decided on the basis of

the facts, which were undisputed so far as actually bear on this issue, that the loss of the Logair contract with the Government by Aaxico and its complete suspension of operations pending the negotiation of a future contract, which occurred approximately one year later, neither amounted to a termination nor did it justify Aaxico in terminating it unilaterally.

Thus, the trial court also answered the second issue. It decided that it was the proper tribunal to pass on this legal question.

The trial court also answered issue No. 3 by stating that it had jurisdiction to determine that under the contract there were certain rights both of ALPA and of its members that were violated when Aaxico hired new pilots, and paid them different rates of pay than provided for under the agreement and when it hired the new pilots without reference to the seniority and other provisions of the existing agreement.

The court, thus, also decided issue No. 4, partially, to the effect that it was the proper tribunal to determine what rights under the contract had been violated, but it also decided that there were certain other contract disputes that should be referred, following grievance procedures as outlined in the agreement, to the System Board of Adjustment.

Finally, the court answered issue No. 5, both by the action it took in resolving issues Nos. 1 and 3, but

also by concluding that it had the power to require Aaxico to assure the setting up of a System Board of Adjustment in order that grievance procedures could be pursued as provided for under the Railway Labor Act.

We conclude that the jurisdiction of the court was considerably more limited than that which it exercised. To the extent that the trial court could find on the record before it that the appellant had failed to make available the grievance machinery in order to permit a reference to a System Board of Adjustment, and to the extent that the court could find that ALPA had not either acquiesced in or abandoned any rights which it may have had under the contract, if not terminated, it would be within the competence of the trial court to have required Aaxico to assure the availability of grievance procedures and a System Board of Adjustment. In point of fact, Aaxico did not appeal from that part of the trial court's order which required it to "join with plaintiff Air Line Pilots Association in establishing a System Board of Adjustment to function under said contract; and give effect to such System Board, as set out in the System Board Agreement of said contract."

This is another one of those cases which, when brought to court, poses the preliminary question whether the relief sought is relief which can appropriately be granted by the court or which, under the

carefully considered scheme of the Railway Labor Act, must be resolved by the System Board of Adjustment. The answer to this question is found in determining whether the dispute is what has generally been recognized in cases arising between carriers and their employees as a "minor" dispute or a "major" dispute. This terminology, used by the Supreme Court in **Elgin, Joliet & Eastern Rwy. Co. v. Burley,** 325 U.S. 711, was discussed by us in a recently decided case, **St. Louis, San Francisco & Texas Rwy. Co. v. Railroad Yardmasters of America, AFL-CIO,** 5th Cir . . . . F.2d . . . ., No. 20570, decided March 4, 1964. Pointing out, as we did, in that opinion that the court has adhered to the distinction between minor disputes and major disputes we there said, "It is plain here that the dispute raised by the complaint could be resolved only by construing the existing contract. It follows that the trial court erred in entertaining jurisdiction of the suit. The appellee should have been remanded to the grievance procedure set forth in the contract."

We thus recognized what has always been the distinction between the two types of disputes. If "the dispute relates either to the meaning or proper application of a particular provision [of an existing agreement] with reference to a specific situation or to an omitted case," **Elgin, Joliet & Eastern Rwy. Co. v. Burley,** 325 U.S. 711, it is a minor dispute no matter how seriously it may affect the parties to the contract.

With these general principles in mind we look

first to the first issue stated above. Clearly, the complaint by which this litigation was started was based on the theory that the agreement between Aaxico and ALPA was a continuing one and was still in effect. The complaint showed that the appellant had proceeded on the theory that the contract had been terminated. How, then, was this question to be decided? Obviously, it could be decided only by interpreting the agreement itself and thus it was a minor dispute, one which under the completely uniform holdings of the courts must be submitted to the grievance procedures with final decision to be made by the System Board of Adjustment. We conclude, therefore, that it was beyond the competence of the trial court to resolve this dispute.

So, too, with respect to the other interpretations made by the trial court of the obligations of the parties under the terms of the agreement. For instance, whether, assuming the contract was still in effect, Aaxico was required to recall for the operation of the new equipment requiring greater or different skills, the pilots who had previously been furloughed, was necessarily to be determined from the contract of employment. The failure of Aaxico to recall the pilots and, in their place, to accept pilots furnished by another agency, if objected to by ALPA or any of the plaintiffs, was the proper subject of grievance procedures in the traditional sense. Thus, it was beyond the competence of the trial court to resolve these issues as well,

of course, as the issue of whether the pay requirements under the contract were to be carried out.

We think it clear that if the proof shows that Aaxico made impossible the carrying out by the appellees of the grievance procedures to the System Board of Adjustment, the trial court had jurisdiction to order Aaxico to carry out its obligations under the contract to make arbitration and decision of these matters effective. **Virginia Rwy. Co. v. System Federation No. 40,** 300 U.S. 515.

The undisputed facts present in this case probably warrant a comment that, regardless of how the trial court finally determines the factual issues, a normal processing of the disputes immediately after they arose would have proved the efficacy of the plan contemplated in the Railway Labor Act, whereas the failure to resolve these disputes promptly has resulted in litigation that will inevitably lead to serious unanticipated loss to one party or the other. This is true because if the question of the termination of the contract had been resolved in the fall of 1960 at a time when no pilots were employed or sought to be employed by Aaxico, this whole dispute might well have been resolved before the commencement of the operations by the use of new equipment July 1, 1961. We do not intimate a judgment on the issue whether the circumstances existing after the exchange of correspondence at that time amounted to either an ac-

quiescence by appellees or a waiver of a right to pursue the dispute further, but we do hold that the extent of the rights of the appellees thereafter was to present their contention to the district court that they were unable to pursue their grievance procedures because of stated failures on the part of the appellant to make such processes available. Thereupon the trial court could promptly have resolved this issue either by directing submission of the questions to the grievance procedures or by holding that the appellees no longer had such rights.

The judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

APPENDIX B

Statutory Provisions

The relevant provisions of the Railway Labor Act (44 Stat. L. 577, 48 Stat. 1185, 49 Stat. 1189, 45 U.S.C., Sec. 151 et seq.) are as follows:

TITLE I

Sec. 2. General Purposes. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

General Duties. First. (Duty to settle disputes.) It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all

disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. (Conferences between representatives.) All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. (Designation of representatives.) Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. (Employees' right to organize and bargain collectively; freedom from interference by carrier.) Employees shall have the right to organize and bargain

collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefore, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: **Provided,** That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * *

Sixth. (Conference of representatives; time; place; agreements between parties.) In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: **Provided,** (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: **And provided further,** That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. (Change in rates of pay, etc., contrary to agreements forbidden.) No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act.

Ninth. (Disputes as to who are employees' repre-

sentatives; investigation by Mediation Board; elections.) If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the disputes, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purpose of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make

copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

* * *

Sec. 5. Functions of Mediation Board, First. (Disputes as to which services of Mediation Board may be invoked.) The parties, or either party, to a dispute between an employee or group of employees and carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor

as its final required action (except as provided in paragraph third of this Section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. (Interpretation of mediation agreement.) In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

* * *

Sec. 6. (Notice of Intended Change in Agreements Affecting Rates of Pay, Rules, or Working Conditions.) Carriers and representatives of the employees shall

give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipts of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Board.

* * *

TITLE II

Section 201. (Application of Title I to Air Carriers and Employees.) All of the provisions of Title I of this Act, except the provisions of Section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every

air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

Sec. 202. (Inclusion in Definitions of "Carrier" and "Employee." The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of Title I of this Act, except Section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee," respectively, in Section I thereof.

Sec. 203. (Extension of Jurisdiction of Mediation Board.) The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation Board and the jurisdiction of said Mediation Board is extended to any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to an adjustment board, as hereinafter provided, and not adjusted in conference between the parties, or where conferences are refused.

The National Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

The services of the Mediation Board may be invoked in a case under this title in the same manner and to the same extent as are the disputes covered by Section 5 of Title I of this Act.

Sec. 204, (Disputes: reference to adjustment board, establishment of boards of adjustment.) The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief of operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not

exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of Section 3, Title I, of this Act.

Such boards of adjustments may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

Office-Supreme Court, U.S.
FILED
OCT 30 1964
JOHN F. DAVIS, CLERK

No. 558

In The

Supreme Court of the United States

OCTOBER TERM, 1964

AAXICO AIRLINES, INC.,
Cross-Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al*,
Respondent.

MEMORANDUM IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

CHARLES J. MORRIS
1601 National Bankers Life Building
Dallas, Texas 75201

HENRY WEISS
605 Third Avenue
New York, New York

MAURY MAVERICK, JR.
906 Maverick Building
San Antonio, Texas

Attorneys for Petitioners

REILLY PUBLISHING COMPANY — 1713 S. HARWOOD — DALLAS, TEXAS — RA 8-8385

In The

Supreme Court of the United States

OCTOBER TERM, 1964

No. 558

AAXICO AIRLINES, INC.,
Cross-Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al*,
Respondent.

MEMORANDUM IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

The filing of the instant cross-petition for writ of certiorari emphasizes the importance of the questions presented in the petition for certiorari in No. 522. We deem it unnecessary to reply to the instant cross-petition except to note three items.

1. Contrary to the assertion on page 4, Aaxico did not move for dismissal of the action on the ground that the Railway Labor Act vests jurisdiction of the dispute exclusively in administrative bodies created pursuant to the Act. Such a position was an afterthought, which was not preserved in the district court. The cited record references (R. 41-2, 56-7, 116-18) and the corresponding pages in the printed record so indicate. The point was not timely in the Court of Appeals; neither is it timely in the Supreme Court.

2. The Court of Appeals did not consider cross-petitioner's point regarding alleged jurisdiction of the National Mediation Board to be of any importance to the case, for the point was not even mentioned in Judge Tuttle's opinion.

3. There is no question concerning representation in this case. Capitol Airways never assumed Aaxico's agreement, but merely employed a limited number of the furloughed Aaxico pilots from July 1, 1961 to June 30, 1962, under a separate agreement which incorporated by reference some of the terms of the Aaxico-ALPA agreement. That agreement expired on June 30, 1962, and was not renewed. Capitol Airways was not a successor to Aaxico under the Aaxico-ALPA contract [R. 473]. This same Capitol-ALPA contract was reviewed in *Capitol Airways, Inc. v. Airline Pilots Association*, 223 F. Supp. 168, [48 CCH L.C. ¶18,613] (D.C.M.D. Tenn, 1963), where the court found that

> ". . . it had been distinctly understood that Capitol would not continue to employ the [Aaxico] pilots after the expiration of the then current government contract unless it was awarded a new Logair contract then being negotiated.
>
> "Capitol did not get the contract and the Aaxico pilots were furloughed."

The instant case therefore bears no resemblance to *Brotherhood of Railway and Steamship Clerks v. United Airlines, Inc.*, 325 F.2d 576 (CA 6, 1963), Supreme Court docket No. 31, October Term, 1964.

Aaxico admitted in its Answer that ALPA's certification "has never been revoked or cancelled." [R. 596] At no time, at least not until the case was in the Court of Appeals, did Aaxico or anyone else raise a question as to ALPA's status as the certified representative of the class or craft of airline pilots "in the service of Aaxico Airlines, Inc." [R. 37, p. 1]

Conclusion

If certiorari is granted herein [No. 558] it should be for the limited purpose of bringing all of the issues related to or raised in No. 522 before the Court. The proposition of law sought by cross-petitioner, however, should be rejected, for the raising of a frivolous question concerning representation should never deprive a district court of its statutory jurisdiction to enforce the bargaining and status quo provisions of the Railway Labor Act.

Respectfully submitted,

CHARLES J. MORRIS
1601 National Bankers Life Building
Dallas, Texas 75201

HENRY WEISS
605 Third Avenue
New York, New York

MAURY MAVERICK, JR.
906 Maverick Building
San Antonio, Texas

Attorneys for Respondent

October 29, 1964

LIBRARY
SUPREME COURT, U. S.

No. 558

No. 588

Office-Supreme Court, U.S.
FILED
DEC 3 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court Of The United States

October Term, 1964

AAXICO AIRLINES, INC., PETITIONER

V.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, ET AL

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

J. D. WHEELER
A. W. WORTHY
Attorneys For Petitioner

Of Counsel:
BOYLE, WHEELER, GRESHAM, DAVIS & GREGORY
2100 National Bank of Commerce Building
San Antonio, Texas 78205

CLEMENS PRINTING CO., SAN ANTONIO, TEXAS

IN THE

Supreme Court Of The United States

October Term, 1964

No. 588

AAXICO AIRLINES, INC., PETITIONER

V.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, ET AL

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Dismissal of the Petition for Certiorari in Brotherhood of Railway Clerks vs. United Airlines, Inc., No. 31, October Term, 1964, prompts a brief supplement to the petition in this cause.

The decision in the case at bar by the Court of Appeals is, we believe, in conflict with the decision of this Court in General Committee vs. M.K.T. R. Co., 320 U.S.323, 88 L.Ed. 76 (1943), and the decisions of the Courts of Appeals which have followed that decision: Brotherhood of Railway Clerks vs. United Airlines, 325 F.2d 576; Division No. 14 vs. Leighty, 298

F.2d 17 (1962, cert.den. 369 U.S. 885); and Ruby vs. American Airlines, 323 F.2d 576 (2nd Cir., 1963, cert. den. 11 L.Ed.2d 611).

This position is based on two further propositions: first, that the shift of the bargaining unit in this case from AAXICO to CAPITOL, when the pilots followed the work, raised substantial questions as to whether the representative and contract status of the union and pilots to AAXICO survived; and second, that the Court of Appeals in this case, contrary to General Committee, supra, took jurisdiction of this issue as a judicial question.

As to the first of these propositions, there can be little doubt that Capitol Airways, Inc., succeeded to the business AAXICO had theretofore performed, and took over aircraft, flight schedules, pilots and collective agreement. (R. p. 449-50) Under settled doctrine Capitol was clearly obligated to and did accept ALPA as bargaining agent for the AAXICO pilot group. N.L.R.B. vs. McFarland, 306 F.2d 219 (10th Cir. 1962). Whether Capitol was bound by the AAXICO agreement as a "successor" under strict contract law is not significant in view of the holding of this Court in Wiley & Sons vs. Livingston, 11 L.Ed.2d 898, that under circumstances present here some contractually created obligations survive a change of employers without regard to traditional contract concepts, and the further fact that Capitol did expressly assume that contract.

The novel and significant question presented by this case is whether the succession of Capitol to these representative and contractual relationships theretofore held by AAXICO relieves AAXICO of further obligations under them. We submit that the very policies seeking stability in labor relations and industrial peace that require the assumption of these obligations by a new employer require that the old employer be relieved of them.

The second proposition stems from the holding of the Court of Appeals as follows:

> ". . . To the extent that the trial court could find on the record before it that the appellant had failed to make available the grievance machinery in order to permit a reference to a System Board of Adjustment, **and to the extent that the court could find that ALPA had not either acquiesced in or abandoned any rights which it may have had under the contract, if not terminated, it would be within the competence of the trial court** to have required Aaxico to assure the availability of grievance procedures and a System Board of Adjustment." (Petition for Writ of Certiorari. No. 558. Appendix A, p. 9a) (emphasis added)

Under the opinion, the trial court may find as a fact that ALPA and the pilots, by reason of their following the work to Capitol, either acquiesced in the termination of the relationship by AAXICO or abandoned their representative and contract rights. The limping of the representation issue into these familiar

terms of "abandonment" and "acquiescence" cannot disguise the authority granted to the trial court to decide whether ALPA continues to have representation rights against AAXICO. The exercise of this authority is precisely what this Court withholds in General Committee vs. M.K.T., supra, followed in Railway Clerks vs. United Airlines, supra, and Ruby vs. American Airlines, Inc., supra.

How shall these issues be resolved: by the courts, the National Mediation Board or the system boards?

The Sixth Circuit in Brotherhood of Railway Clerks vs. United Airlines, supra, would send them to the National Mediation Board for adjudication under Sec. 2 Ninth of the Act. The Board rejects this view, and considers the jurisdiction given it under this section to include only disputes as to who shall represent a class of employees.

In its **Memorandum for the United States as Amicus Curaie,** pp. 11, 15, filed in the Railway Clerks Case in this Court, the government suggests that such disputes involve application of collective agreements and are thus within the jurisdiction of system boards of adjustment. The decision of the Fifth Circuit in the case at bar is erroneously cited in support of this view. We submit that the system board, created by contract, is not an appropriate body to determine rights of a body of employees not a party to the contract, nor is the system board an appropriate body to resolve disputes which question the validity and con-

tinued existence of the very contract which created and regulates it.

If the Board's position that disputes of the type here involved are not within Section 2 Ninth is accepted, the Act nevertheless provides means of resolving such disputes. Under Section 2 Sixth, either party to such a dispute may demand and must be accommodated to a prompt meeting, followed if necessary, by all the mediatory and arbitration processes afforded by the Act. It is these processes which ALPA and its members wholly failed to exercise in this case, thereby frustrating the scheme of the Act.

We respectfully submit that this Court should grant the writ applied for and that it should clearly delineate judicial and administrative jurisdiction of representation disputes.

J. D. WHEELER

A. W. WORTHY

Of Counsel:

BOYLE, WHEELER, GRESHAM, DAVIS & GREGORY
2100 National Bank of Commerce Building
San Antonio, Texas 78205

I hereby certify that a true and correct copy of the foregoing "Supplemental Brief in Support of Petition for Certiorari" has been served on the following attorneys by United States Mail, postage prepaid, this ..... day of November, A.D. 1964.:

MR. CHARLES J. MORRIS
Mullinax, Wells, Morris & Mauzy
1601 National Bankers Life Building
Dallas, Texas

MR. MAURY MAVERICK, JR.
Maverick Building
San Antonio, Texas